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IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

No. 391

CHARLES E. LEGGETT AND JOHN HENRY ELEVELD,
Petitioners,

vs.

UNITED STATES OF AMERICA,
Respondent.

On Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Sixth Circuit, and Brief in support of Petition.

Petition for Writ of Certiorari

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Petition for Writ of Certiorari

To the Honorable Chief Justice and Associate Justices of the United States:

The petitioners were found guilty by a jury on both counts of an indictment charging violation of Sections 2314 and 2, Title 18, United States Code. On April 1, 1961, petitioner Charles E. Leggett, was sentenced to one year and six months and petitioner, John Henry Eleveld, was sentenced to one year.

On appeal from said judgments the Circuit Court of Appeals for the Sixth Circuit, on July 25, 1961, affirmed said judgments as to each petitioner; and on August 15, 1961, denied a rehearing of said cause.

SUMMARY STATEMENT OF MATTER INVOLVED

On or about April 14, 1959 a Federal Grand Jury indicted petitioners Charles E. Leggett and John Henry Eleveld in the said District Court charging said Charles E. Leggett and John Henry Eleveld with transporting and causing to be transported certain merchandise of the value in excess of $5,000.00 knowing the same to have been stolen, converted or taken by fraud.

The Indictment contained two counts: Count One of the indictment charged that the petitioners did transport and cause to be transported in interstate commerce * * * certain goods and merchandise * * * of the value in excess of $5,000.00, knowing the same to have been stolen, converted or taken by fraud. Count Two charges the same crime but on a different date.

The petitioners pleaded not guilty, were tried by a jury, and were found guilty on both counts of said indictment.

Motions for Directed Verdict, Motions for New Trial and In Arrest of Judgment were denied and a Bill of Exceptions was presented.

On appeal, the Circuit Court of Appeals for the Sixth Circuit affirmed the judgments as to both petitioners, and on petition for rehearing the opinion and judgments were adhered to and the petition for rehearing was denied on August 15, 1961.

THE INDICTMENT

Count One of the Indictment charges petitioners with transporting and causing to be transported in interstate commerce from Detroit, Michigan in the Eastern District of Michigan, Southern Division, to Fort Dodge, Iowa certain goods and merchandise to-wit: 106 drums of polyester resin of the value in excess of five thousand dollars, knowing the same to have been stolen, converted or taken by fraud on or about November 7, 1957, in violation of Sections 2314 and 2, Title 18, United States Code. The charges in Count Two of the Indictment are the same except as to the date which was on or about May 12, 1958.

STATEMENT OF FACTS.

On the trial, the government introduced testimony in an effort to prove the charges in the indictment.

Winifred Wheeler testified that she was employed by Reichhold Chemicals Company in Ferndale, Michigan, as manager of order shipping and traffic departments. That a written purchase order was received by Reichhold in October, 1957, for a certain quantity of resin from National Procurement Company, a corporation. Previous to receiving the written order she received a phone call from a person who identified himself as a Mr. Wilson and a representative of National Procurement Company.

That subsequent to receiving the written order, one D. Robinson picked up at the Reichhold plant 106 drums of resin. This pick-up was made on October 23, 24, 1957.

That Reichhold received another order dated April 24, 1958, from National Procurement Company for a certain quantity of resin. That this order was also picked up at the plant. That the first order was for 106 drums of resin for a total of $16,112.00. The second order was for 114 drums of resin for a total of $18,240.00.

That Reichhold did not receive payment for the October, 1957, order or the April, 1958 order. (4a-37a)

Norman Miller testified that he was vice-president of a telephone answering service at 550 Fifth Avenue, New York City. That National Procurement Company rented a phone and mail service from his company. That National Procurement received phone service and all mail that was addressed to National Procurement Company at 550 Fifth Avenue, New York City, would be received by the phone service.

That all phone messages and mail that was received for National Procurement Company would be put in a box assigned to it. That his records indicated that all mail received for National Procurement was to be forwarded to an address in Chicago, Illinois.

That he (Miller) never met anyone connected with National Procurement Company. That the application for the service bore the name "Charles E. Leggett" and his address as 6649 North Caldwell Avenue, Chicago, Illinois. (38a-44a)

Loretta Agnes Nealon testified that she operated a telephone secretarial service in Washington, D.C. the address of which is 438 Woodward Building. That from November, 1957, through September, 1958, National Procurement Company used her phone service.

That a man who said he was a representative of the Ferro Company left a card with her. That she never met anyone connected with National Procurement Company. That from time to time someone who gave his name as Mr. Eleveld and someone who gave his name as Col. Stewart and someone who gave his name as Charles Leggett called and inquired if any messages were left for any of them. That she also received messages for National Procurement Company. That on July 1, 1958, she received a call from someone who identified himself as a Mr. Keeler of Reichhold chemicals of White Plains, New York, asking for a Col. Eleveld of National Procurement Company, and that Col. Eleveld should call him. She also received one or two calls from someone asking for Mr. Leggett. That she received other messages from someone who said he was Mr. Keeler of Reichhold Chemicals of White Plains, New York, again inquiring for Col. Eleveld.

That when National Procurement first received phone messages and mail they were sent to the New York office of National Procurement; later she was instructed to send all messages and mail to Box 110, Oak Park, Illinois, attention of Charles E. Leggett.

That she received letter saying "send all bills and mail to above address and any phone calls just merely say that whoever they ask for is out and take the message. The following will be the only ones to receive messages: Charles Leggett, Carlton Stewart, Jack Eleveld." This letter was signed, "J. Eleveld." (44a-67a)

Elmer W. Keeler testified that he was assistant accounting supervisor for Reichhold Chemicals in the White Plains, New York, office. During the period from November, 1957, through May, 1958, he was credit manager. He received calls from persons identifying themselves as Col. Stewart and Col. Eleveld. That he wrote to both the Fifth Avenue office and Washington, D.C. office of National Procurement Company in an attempt to collect the money due his company. That he did nothing to check the credit of National Procurement after he received the second order in April, 1958. That he believed that both orders were Federal Government orders. That Reichhold Chemical Company had a history of dealing with the Federal Government. That he made no effort to ascertain whether or not this was an Army order. (68a-126a)

Dale Robinson, testified that he knew defendant, Eleveld. That Eleveld asked the witness if he would haul some stuff for him out of Reichhold's plant at Ferndale, Michigan. That he picked up 106 drums of material at Reichhold and delivered them to Bond Steel and Storage at Dearborn, Michigan. That when he went to Reichhold plant that he asked for "pick-up" for National Procurement Corpora-

tion. That when he arrived at Bond Steel and Storage he met Eleveld there. That he was paid for the hauling by Eleveld. (126a-144a)

Jerry L. Gottfried testified that he was an executive of Bond Steel and Storage. That he received a letter that the 106 drums had been transferred to one, Joseph Dunwood, and/or Acme Limited, Zurich, Switzerland, signed "National Procurement and Distributing Corporation, J. Eleveld." That a bill for unloading and storage charges was sent to National Procurement & Distributing Corporation, at 550 Fifth Avenue, New York City. That the bill was paid by cash. He does not know who paid it.

That Bond Steel and Storage received a letter on the letterhead of Acme Limited, Zurich, Switzerland, dated October 28, 1957, to release the 106 drums, signed "Joseph Dunwood, Acme Limited representative." Warehouse receipts were enclosed in the letter. That the 106 drums were released to Sansone Brothers, a trucking company. He does not remember ever meeting Eleveld or Leggett (144a-165a).

Leonard Sidor testified that in the years 1957 and 1958 he was employed by Bond Steel and Storage as a foreman. That the company had 106 drums of material stored there. That between October 23, 1957 and October 28, 1957, the defendant Leggett and two other men came to the warehouse. That Leggett and the two men picked out 4 or 5 different drums, inserted a syringe into them, tested the material and then left. Leggett said they were sent by National Procurement to test the material. He could not identify the other two men. That he did not know Leggett. (165a-175a)

Peter S. Maisano testified that he was in the automobile business. That he knows defendant Leggett. That he first met Leggett in the fall of 1957. That Leggett came to

the witness' office with defendant Eleveld and another man whom he was unable to identify. He identified Leggett and Eleveld in the courtroom. That Leggett asked the witness if he knew of a company who could haul some large barrels. Leggett asked if he could use the typewriter. That Leggett took some stationery out of a brief case and typed something on it. The witness did not see the stationery.

That a truck driver came with a truck. Leggett gave the truck driver the letter which he had typed. From Maisano's office Leggett, Eleveld and another man, who came with Leggett and Maisano then drove to Jefferson Terminal Warehouse. Eleveld drove.

Maisano said he was going to purchase five hundred Volkswager autos from National Procurement. That he and Leggett traveled to Europe together. They went to Frankfort and Hamburg in Germany. He said that his partner had given Leggett a deposit. They did not make a deal for the cars. (179a-191a)

Vincent Mongogna testified that in October, 1957, he was a truck driver for Sansone Bros. Cartage Company. That he and another driver went to Maisano's office. That Leggett was there and other men whom he did not know. That he and the other driver went to Bond Steel and Storage warehouse. That Leggett with a tube tester tested 3 or 4 barrels. That he and other driver loaded the barrels onto the trucks. That there was another fellow there but witness did not see him in the courtroom. After loading he and another driver drove to Jefferson Terminal Warehouse in Detroit. That the trucks were unloaded at Jefferson. That Leggett, Maisano and another fellow were there. That Leggett paid him at Maisano's office in cash. That all three of the men there pulled money out of their pockets to pay him. (192a-198a)

Joseph E. Hall, testified he was president of McCoy Truck Lines. That McCoy received 106 drums and 114 drums of polyester resin. That the consignee was Glass Craft Boats, Inc. of Fort Dodge, Iowa, and the consignor was E. A. Juzwik, Jefferson Terminal Warehouse, Detroit, Michigan. (198a-208a)

Alyce M. Albro testified she was office manager of Jefferson Terminal Warehouse in Detroit. That on October 28, 1957, the warehouse issued a receipt for 106 drums. That on November 12, 1957 50 drums were shipped to Glass Craft Boats, Inc. at Fort Dodge, Iowa. That another 56 drums were shipped to Glass Craft Boats, Inc. That the 106 drums were shipped because a telegram was sent by Glass Craft Boats, Inc. at Fort Dodge, Iowa, telling Jefferson to ship the 106 drums. That warehouse receipts are made out in quadruple, white, blue, pink and yellow. The pink one is sent to the shipping department, the blue one is kept in the office, the white and yellow are mailed to the customer. She said, she got authority to release the 106 drums from one Juźwik.

That three men came into the office of Jefferson. That two of the men were the defendants, Leggett and Eleveld, whom she identified in court. She said that Eleveld asked to see the man in charge so she took him back to see her boss, Mr. Webster.

That Mr. Webster introduced Eleveld to her as Joseph Dunwood. She identified a calling card as having been brought in at the time the 106 drums were stored with Jefferson. She said that Mr. Webster gave her the card in front of the two men. That the name on the card was Joseph Dunwood. That she saw Eleveld give the card to Mr. Webster.

That she personally typed the white, pink, blue and yellow warehouse receipts. That Eleveld paid her $132.50 handling charge. That Eleveld signed the name, "Joseph Dunwood" in her presence. The witness identified receipts showing Jefferson had received 106 drums from Bond Steel and Warehouse. That the receipts showed they were to be charged to Joseph Dunwood and/or Acme Limited. The receipt further showed they were to be shipped to Joseph Dunwood and/or Acme Limited, Zurich, Switzerland. That Lake Motor Freight picked up the 106 drums. That Eleveld introduced himself to the witness as Joseph Dunwood.

On cross-examination the witness Albro testified of the three men who came into her office, one was Leggett, one was Eleveld and one was government witness Maisano. On direct examination, she testified that she did not know who the third person was. That Maisano was there when Eleveld allegedly introduced himself as Joseph Dunwood. That Maisano did not correct Eleveld when he introduced himself as Joseph Dunwood. That Maisano was within hearing distance. That on the white warehouse receipt there appeared the name "Juzwik." That Juzwik called and said he was mailing the white slips to Jefferson Terminal Warehouse. (208a-248a)

Edmund Juzwik testified that he was a vice president, director and stockholder of Glass Craft Boats, Inc. located at Fort Dodge, Iowa. That he was active in the business in the years 1957, 1958. That he knows Leggett. He identified Leggett in the courtroom. That he knew Leggett 7 or 8 years. That he lived next door to Leggett in Chicago. That in November, 1957, he bought some polyester resin. That Leggett told him he knew a man by the name Dunwood who represented a company in Switzerland who had some material for sale. That after this conversation he purchased this polyster resin. That the resin came from

Jefferson Terminal Warehouse in Detroit. That later he purchased some fiber glass cloth that came from Tennessee. That later he purchased some more resin that came from Detroit.

He then identified a check for $7,000.00 numbered 566 payable to Joseph Dunwood, issued by himself. Another check numbered 678 payable to Detroit Harbor Terminals, Inc. for $165.30 issued by himself. Another check number 677 for $14,453.70 payable to Joseph Dunwood. Another check number 592, payable to Joseph Dunwood as a final payment for 106 drums of resin. All of these checks except number 678 were endorsed by Dunwood.

He testified he gave the checks to Leggett and that Leggett turned over to him certain warehouse receipts. That he paid an additional sum of $3,389.00 in cash to Leggett. Leggett said he needed this sum in cash. He said that his brother obtained a sample of the resin.

He further testified that he made the checks payable to Joseph Dunwood at the request of Leggett. That he met a man that represented or stated his name was *Joseph Dunwood*. That the meeting took place in his office. That he could probably recognize the individual. That he saw no one in court who introduced himself to Juzwik.

He further testified that Leggett told him that Dunwood represented some company in Switzerland who was buying merchandise in America and from time to time would have surpluses that it would like to dispose of.

That his name appeared on 10 Jefferson Terminal Warehouse receipts. That he placed his signature on the receipts after he purchased and paid for them. That Leggett requested he place his (Juzwik's) signature on the receipts so as to transfer the material from Dunwood to himself. That the total quantity of receipts represented

were 106 drums of resin. That he sent the receipts to McCoy Truck Lines and that was the last he saw of them.

On cross examination, he testified he authorized McCoy Truck Lines to pick up the drums and deliver them to his factory at Fort Dodge, Iowa. That he sent the telegram to Jefferson Terminal Warehouse; that he had bought the receipts; that he mailed the receipts to McCoy Trunk Lines. (249a-271a)

George E. Kinnie testified that he operated the Kinnie Annex Cartage Company; that on May 2, 1958, he made a pick up of 114 drums at Reichhold Chemicals and delivered them to Detroit Warehouse Company in Detroit. That the shipment was paid for by National Procurement. That the bill was made out to National Procurement & Distributing Corp. (276a-281a)

Bert Cohen testified that he was the owner of Detroit Warehouse Company at Detroit, Michigan. That he received and stored 114 drums of material for storage. That he released the drums to Brada Caratge Company. That he received a communication from National Procurement to release the drums to Joseph Dunwood and/or Acme Limited, Zurich, Switzerland. That the communication was signed "National Procurement & Distributors Corporation, by C. O. Stewart". That on the bill for storage he noted "Transaction per Mr. Leggett." That he met Leggett. That he made up a shipping release. The shipper was National Procurement Distributor Corporation "through J. Eleveld." That the name Eleveld was given to him on the phone. That he called Eleveld at CRestwood 8-1481. That the warehouse bill was paid by Leggett. That on May 5 and 6, 1958, the merchandise was transferred from National Procurement to Joseph Dunwood and/or Acme Limited. (284a-294a)

Morris Shearer testified that he worked for Brada Cartage Company. That on May 6, 1958, Brada picked up the 114 drums at Detroit Warehouse Company and delivered them to Detroit Harbor Terminals, Detroit, Michigan. That Brada was paid by Eleveld. (295a-298a)

Thomas McIntosh testified he was a driver for Brada; that he picked up 114 drums at Detroit Warehouse Company and delivered them to Detroit Harbor Terminals, both in Detroit. He identified Eleveld as the person he saw at Detroit Harbor Terminals. (299a-300a)

Sally Church testified she was employed by Detroit Harbor Terminals. That she was secretary to the president. That a man, who introduced himself to her as Joseph Dunwood, made arrangements to store the 114 drums in the warehouse. She identified Eleveld as the man. That he came in and asked that the merchandise be released; that he was in a hurry to leave for Switzerland. That the records of Detroit Harbor Terminals indicate: that it received 114 drums from Brada Trucking to the account of Joseph Dunwood. That a letter received from Acme Limited authorizing the release of 114 drums to Mr. Juzwik. The letter was signed "Joseph Dunwood, Adams Hotel, 87th and 5th Avenue, New York City." That on June 4, 1958, and on June 12, 1958, Norwalk Trucking picked up 57 drums on each day. That all but $165.00 of the storage bill was paid by Eleveld. That the $165.00 was paid by Juzwik. (301a-322a)

Donald M. Bolger testified that the number "Crestwood 8-1481" was registered in the name of John Eleveld. (322a)

Edward Paley testified that he was sales manager of Exeter Manufacturing Company at Exeter, New Hampshire. That his records show a purchase order from Na-

tional Procurement for the purchase of fiber glass; that on the bottom of the purchase order it is signed, "J. Eleveld, Lieutenant Colonel." That an "acknowledgement" copy was returned to him signed "J. Eleveld, National Procurement, Lieutenant Colonel."

That some one called him on the phone and identified himself as "Colonel Eleveld, National Procurement Office for Emergency Purchases, Washington, D. C." That in this phone conversation a request was made for prices; that the call came from Washington, D. C.; that he did not request a credit check. That the reason he did not make a credit check was that he accepted the order as a Government order.

That in the course of his employment he received many government orders; that he was familiar with all Government orders.

That he had a phone conversation with one who identified himself as Lieutenant Colonel Eleveld in early June, 1958. The caller identified himself and his organization and request delivery of fiber glass fabric. He had other subsequent conversations regarding change in specifications.

That the material was picked up at the Exeter Plant and were stored in Manchester, New Hampshire. That the material was traced there after the Exeter Company found out it was not dealing with the Government and the goods were seized and taken back to the Exeter plant.

On cross examination he identified the purchase order. On the bottom was the legend: "National Procurement, District Procurement Director." Also the legend, "National Procurement Dist." With some printed matter

obliterating the other matter. He said he never met anyone from the National Procurement Corporation. That he never made any attempt to find out whether National Procurement Corporation existed. He just accepted it as a Government agency. That he never contacted anyone in the government office when he received a Government order. (323a-346a)

Charles Magarian testified that he was sales supervisor for Ferro Corporation at Nashville, Tennessee. That he received purchase order from National Procurement. That he received a phone call from a person who identified himself as Lieutenant Colonel Eleveld. That the caller wanted a quotation and delivery on certain amount of fiber glass material. That he was with an emergency purchasing group and that the material would be used for the missile program. That following this phone call he received a purchase order.

That there was a second purchase order. That the second purchase order was preceded by a phone call. That the call was from one who identified himself as Lieutenant Colonel John Eleveld. The caller stated that he would not call again but that another man would call, a Colonel Carlton Stewart.

That on neither purchase order did he make a credit check because he thought he was dealing with the Government. That the merchandise ordered was picked up. (346a-352a)

Lawrence C. Jenks testified that he was employed as a base engineer with the Tennessee National Guard at Berry Field in Nashville, Tennessee. He identified Leggett as

one of the men he met on a prior occasion. He was not sure he met the defendant Eleveld. That Leggett introduced himself to the witness as a Colonel with the Illinois National Air Guard. That Eleveld was also introduced as a "Colonel" but the witness does not remember the name.

That he had a conversation with Leggett. Leggett asked him if he could store some box in Berry Field warehouse, because it was raining, until an Illinois National Guard plane arrived at the field for the purpose of transporting the boxes to Illinois. That the plane did not come and in about an hour some of the boxes that were unloaded were loaded back on the trucks and were taken away. The witness did not know where. (353a-359a)

Aaron H. Webster, called by the defendants, testified he was vice-president and general manager of Jefferson terminal warehouse in October, 1957. He stated that he recognized Government Exhibits 46 and 47. That he was present in his office on October 28, 1957. That he, the witness Albro and three other men were in his office on that date. That there appeared on Government Exhibits 46 and 47 the signature "Joseph Dunwood." To the best of his knowledge the signature "Joseph Dunwood" was placed there in his presence. That he could not positively know whether or not the defendants were in his office on October 28, 1957. (375a-380a)

Richard Bowen was called as a witness by the defendants. He testified he was a document examiner and handwriting expert. After giving his qualifications he was asked to examine Government Exhibits 46 and 47. He further testified that he had defendant Eleveld write the name "Joseph Dunwood" on sheets of paper many times.

That he compared the writing on Exhibits 46 and 47 with the writing he had defendant Eleveld do. That in his opinion the signature "Joseph Dunwood" appearing on Exhibits 46 and 47 and the signature "Joseph Dunwood" which he had Eleveld write were not the same and were not written by the same person. (These were the signatures which Government's witness Albro positively stated Eleveld *signed in her presence.*) (381a-399a)

JUDGMENT AND OPINION OF THE CIRCUIT COURT OF APPEALS

The opinion of the Circuit Court of Appeals rendered in the cause appears at pages 33-40.

The holding of the Court was to the effect that the evidence sustained the charge of obtaining the goods and merchandise by fraud and transporting or causing the same to be transported across state lines.

JURISDICTION

Jurisdiction to issue the Writ is under the provisions of Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925. (28 U.S.C.A., Sec. 1254) Based on Title 28, U.S.C. 1940 Ed. Sec. 346 and 347 (March 3, 1911, C. 231, Sec. 239, 240, 36 Stat. 1157; Feb. 13, 1925, C. 229, Sec. 1, 43, Stat. 939; Jan. 1, 1928, C. 14, Sec., 1, 45, Stat. 54; June 7, 1934, C. 426, 48 Stat. 926) (from Revisors Note, Title 28 U.S.C.A. Judiciary and Judicial Procedure, Sec. 1254, P. 42), and,

Rule 19 (b) Rules of the Supreme Court of the United States (conflict of decisions between two separate Circuit Courts of Appeal).

QUESTIONS PRESENTED

Can a conviction be sustained where the record conclusively demonstrates that the evidence does not support the charge that the defendants transported and caused to be transported in interstate commerce certain goods and merchandise knowing the same to have been stolen, converted or taken by fraud; in violation of Sections 2314 and 2, Title 18, United States Court?

Can the Grand Jury, the Prosecutor, the District Court, the Circuit Court of Appeals expand the statutory provisions by adding or reading into said statute an intent not expressly stated by Congress?

Conflict between the *Gordon* Case (*U.S. v. Gordon*, 253 Fed. 2nd. 177) and this case which Supreme Court should resolve.

REASONS FOR ALLOWANCE OF WRIT

1. It was not proved that petitioners or either of them transported or caused to be transported any merchandise in interstate commerce.

2. It was not proved that petitioners or either of them knew the merchandise in question had been converted or taken by fraud.

3. The indictment in this matter charges that petitioners transported and caused to be transported in interstate commerce certain merchandise of the value of five thousand dollars, knowing the same to have been stolen, converted or taken by fraud, in violation of sections 2314 and 2, Title 18, United States Code.

4. The statute makes a federal offense only when three essential elements are present: (1) the goods obtained

must be of the value of five thousand dollars or more; (2) They must have been obtained by fraud; (3) They must have been transported from the taking state into another state. There must be a connection between the defendants and the act of transportation. In the instant case the sale was completed in Detroit. The purchaser who paid for the merchandise in Detroit and resold it to his own corporation who transported it to their Iowa plant.

5. The evidence does not support or establish the essential elements of the crime charged: (1) that the petitioners obtained the goods by means of fraud and (2) that they transported or caused to be transported goods allegedly converted or taken by fraud into interstate commerce.

6. The Circuit Court of Appeals disregarded entirely the holding in the *Gordon* Case which up to the time of trial of the instant case was the law, and in consequence the instant case is in direct conflict with the rule in the *Gordon* Case, and this court should take judicial notice of such conflict and either sustain or overrule one or the other.

ARGUMENT.

I.

DID THE EVIDENCE SUPPORT THE VERDICT OF GUILTY ON COUNTS 1 AND 2 OF THE INDICTMENT?

The record is bare of any evidence by the prosecution that shows that the defendants knowingly transported or caused to be transported the merchandise herein in dispute.

First, because no sale was made by the defendants to the ultimate purchaser.

Second, the goods were sold to Dunwood of New York in Detroit, who transferred it to his own warehouse.

Third, Dunwood sold it himself in Detroit to Juzwik who in turn sold it to a corporation who ordered the merchandise transported to Iowa by its own order, hiring its own transportation company.

Fourth, the government failed to prove the value of the goods. There is no proof as to what was to be paid for the merchandise by any of the government witnesses.

Fifth, neither Eleveld nor Leggett are identified by any of the persons connected with the selling company.

Sixth, the testimony of the credit manager, the office manager, and the sales manager cannot be squared with the fact when they stated that they were under the belief that they were dealing with a government agency and as a consequence filled a second order for the merchandise several months after the first order was delivered and unpaid for. The lower court erred when this testimony was allowed to go to the jury over the objection of defendants

and was prejudicial to the defendants without any factual foundation to support such statements. There was no proof in the record that the purchase order was identical with or even similar to a government order. Particularly when all three testified that their company had received several government orders prior to this transaction and furthermore the government failed to introduce in evidence a sample of a government order so that the jury might make comparison and determine whether or not the order placed by National Procurement Company was such as to deceive the people at Reichhold Chemical Company. This too was prejudicial.

Seventh, this record lacks any support that the goods had been stolen, converted or taken by fraud. The United States government has extended its jurisdiction in this case to a purely local crime, if in fact any crime was committed, by invoking the interstate commerce statute.

The arrest and conviction of persons under Federal law in Federal courts for the commission of purely local offenses is usurping the function of State Government. It is the broadening self-usurpation of power by Federal officials and meddling in purely states' rights. The seizure, arrest, trial and conviction of citizens by the Federal officials on the pretext that the culprit has violated Federal Interstate law is stretching the concept of Federal jurisdiction to cover and blanket crimes not contemplated by the statute. This court should take judicial notice that no Federal law was violated by these defendants and Judge Picard stated so in open court in the presence of the Jury that he was doubtful that the Government had proved its interstate violation.

There is not a violation of Federal law in the instant case and the facts are almost identical with the case of *U. S.* v. *Gordon*, 253 Fed. 2nd 177, page 182.

II.

DEFENDANTS DID NOT RECEIVE A FAIR AND IMPARTIAL TRIAL.

(Argued under III.)

III.

THE EVIDENCE WHEN VIEWED IN A LIGHT MOST FAVORABLE TO THE GOVERNMENT FAILS TO PROVE THE DEFENDANTS GUILTY BEYOND ALL REASONABLE DOUBT OF THE CRIME CHARGED IN THE INDICTMENT.

A. The evidence fails to prove that the defendants transported or caused to be transported the polyester resin.

Count I of the Indictment charges that the defendants "did transport and caused to be transported in interstate commerce * * * certain goods and merchandise * * * of a value in excess of $5,000.00, knowing the same to have been stolen, converted or taken by fraud." Count II charges the same crime on a different date.

The government at no time has taken the position that the merchandise in question was converted. It is the contention of the government that the defendants obtained the goods by fraud.

Thus, it will be seen that three essentials are necessary to constitute the crime:

(a) The transporting and causing to be transported;

(b) The value of $5,000.00 or more;

(c) Knowing the goods to have been stolen, converted or taken by fraud.

The burden of proof is upon the prosecution and this burden does not shift to the defendants.

We shall review the evidence at this juncture of our argument which pertains to the so-called transportation in interstate commerce. There is no proof in this record that the defendants knowingly transported or caused the merchandise to be transported across state lines. The facts will undisputably show that the merchandise was bought, delivered, stored, shifted from one warehouse to another, sold to Joseph Dunwood in Detroit, and by him sold through warehouse receipts to Juzwik who himself ordered its transportation to Iowa.

The evidence shows that on or about October 23, 1957, National Procurement Company obtained 106 drums of polyester resin from Reichhold Company which were picked up at the Reichhold plant at Ferndale, Michigan, by a cartage company. That the cartage company delivered the 106 drums to a warehouse called Bond Steel and Storage in or near Detroit, Michigan. The trucker said he was hired by the defendant, Eleveld; that Eleveld met him there and paid him in cash for the delivery.

That a letter was received by Bond Steel on the letterhead of National Procurement & Distributing Co. purportedly signed by Eleveld stating that the 106 drums were transferred to Joseph Dunwood and/or Acme Limited, Zurich, Switzerland. The storage charges were paid for in cash, but by whom was not known.

That a letter was received by Bond Steel dated October 28, 1957, on the letterhead of Acme Limited, Zurich, Switzerland, signed "Joseph Dunwood" to release the 106 drums and enclosing the warehouse receipts. The 106 drums were released to Sansone Bros. Trucking Company.

That Sansone Bros. went to Bond Steel and loaded the 106 drums and hauled the 106 drums to Jefferson Terminal Warehouse in Detroit. The trucks were unloaded at Jefferson. The driver for Sansone saw Leggett, Eleveld, one Maisano and another man whom he did not know. That Leggett paid the driver in cash.

That the 106 drums were shipped by Jefferson to Glasscraft Boats, Inc. at Fort Dodge, Iowa. That a telegram was received by Jefferson from Glasscraft to ship the 106 drums. That the authority to ship 106 drums came from E. A. Juzwik, one of the principal stockholders of Glasscraft, to whom the drums had been sold.

E. A. Juzwik testified he was told by Leggett that Leggett knew a man by name of Dunwood. That Dunwood represented a firm in Switzerland who had some resin for sale. That he purchased the resin and made out checks payable to Dunwood. That the checks were endorsed by Dunwood. That he paid an additional sum in cash to Leggett. He testified that he met a man who represented or stated his name was Dunwood. The meeting took place in Juzwik's office. Juzwik said he probably could recognize the man. That he saw no one in the courtroom that had introduced himself as Dunwood.

E. A. Juzwik further testified that he sent the warehouse receipts to McCoy Trucking Co. That he authorized McCoy to pick up the 106 drums at Jefferson and deliver them to his factory at Fort Dodge, Iowa.

On April 24, 1958, Reichhold received another order for 114 drums of resin from National Procurement Company. These 114 drums were picked up at the Reichhold plant. They were delivered to Detroit Warehouse Co. at Detroit, where they were stored for National Procurement Co. later, on written instructions from National, they were re-

leased from Joseph Dunwood. The warehouse bill was paid by Leggett. On May 6, 1958, Brada Cartage picked up 114 drums and delivered them to Detroit Harbor Terminals, Detroit. Brada was paid by Eleveld. They were stored there to the account of Joseph Dunwood. Later a letter was received from Acme Limited signed by Dunwood to release the drums to Mr. Juzwik. On June 4 and 12, 1958, Norwalk Trucking picked up the drums. All but $165.00 of the storage bill was paid by Eleveld. The $165.00 was paid by Juzwik. The 114 drums were paid for by checks issued by Juzwik and payable to Dunwood.

There is nothing in the record to indicate that the defendants knew that Juzwik had a boat factory in Fort Dodge, Iowa, and for that matter that after he bought the drums of resin that he was going to ship them to Fort Dodge. The record shows that he paid for the drums with personal checks.

The checks were made payable to Joseph Dunwood. There is not a hint that Leggett or Eleveld forged the name of Joseph Dunwood to the endorsements on the checks. There was ample opportunity for the Government to make comparison with the handwriting or endorsements on the checks with the handwriting on the various exhibits introduced by the Government upon many of which appeared the purported signatures of both Leggett and Eleveld.

There is not a hint by the Government that Juzwik and Leggett or Eleveld were in a conspiracy together. The record shows only that Juzwik said he was approached by Leggett and was told that he (Leggett) knew a man who represented some company in Europe who from time to time had some surplus merchandise for sale. As a result of this conversation, he bought this resin and issued checks to Dunwood in payment. The record clearly shows that he

or someone for him ordered the resin shipped to Fort Dodge, Iowa. It was he who hired McCoy Truck Lines to do the shipping from Detroit.

After the drums of resin were sold to Dunwood by National Procurement Company it was a matter of complete indifference to it what happened to the resin. Juzwik admits meeting a man who stated he was Dunwood in his (Juzwik's) office. It certainly was not Leggett because Juzwik knew Leggett and had known him for 7 or 8 years.

In the case of *U. S.* v. *Gordon*, 253 Fed. 2nd 177, the court said at pages 181 and 182:

> "In our view, the assertion that defendant had such knowledge can rest on nothing more than a strong suspicion. The record indicates that after the film was loaded into the car, defendant had no further interest therein, or in the proceeds to be derived therefrom. Such being the case, what difference could it have made to Gordon whether the film was transported by Marshall and Swartz to some other location in the city of Chicago, or to some other point in Illinois, such as Peoria or Cairo? It is not shown how transportation of the film to Detroit was of any benefit to or concern of defendant."

In the case of *Kordel* v. *U. S.*, 335 U.S. 345 at page 349 the Court said:

> "A criminal law is not to be read expansively to include what is not plainly embraced within the language of the statute (*United States* v. *Resnick*, 299 US 207, 81 L. ed. 127, 57 S. Ct. 126; *M. Kraus & Bros.* v. *United States*, 327 US 614, 621, 622, 90 L. ed. 894, 898, 899, 66 S. Ct. 705), since the purpose fairly to apprise men of the boundaries of the prohibited action would then be defeated. *United States* v. *Sullivan*, 332 US 689, 693, 92 L. ed. 297, 301, 68 S. Ct. 331; *Winters* v. *New York*, 333 US 507, 92 L. ed. 840, 68 S. Ct. 665."

In the case of *United States* v. *Acme Can Company,* 299 U.S. 207-210 the Court said at page 209:

> "Statutes creating crimes are to be strictly construed in favor of the accused; they may not be held to extend to cases not covered by the words used. *United States* v. *Wiltberger,* 5 Wheat. 76, 95, 5 L. ed. 37, 42; *Fasulo* v. *United States,* 272 U.S. 620, 628, 71 L. ed. 443, 445, 47 S. Ct. 200."

and at page 210 the Court says:

> "Before one may be punished, it must appear that his case is plainly within the statute; there are no constructive offenses. *United States* v. *Lacher,* 134, U.S. 624, 628, 33 L. ed. 1080, 1083, 10 S. Ct. 625; *United States* v. *Chase,* 135 U.S. 255, 261, 34 L. ed. 117, 119, 10 S. Ct. 756; *Fasulo* v. *United States, supra* (272 U.S. 629, 71 L. ed. 445, 47 S. Ct. 200.)"

In order to justify a jury in finding a verdict of guilty based on circumstantial evidence, the circumstances must not only be consistent with the guilt of the defendant, but they must be inconsistent with any other reasonable hypothesis that can be predicated on the evidence. In the instant case, the point of destination could have been one place as well as another.

B. The evidence fails to prove that the defendant obtained the polyester resin named in the indictment by fraud.

We come now to the question of whether or not the resin was taken by fraud.

In Webster's New Twentieth Century Dictionary fraud is defined as "deceit: deception; trick; artifice by which the right or interest of another is injured; a strategem intended to obtain some undue advantage".

It is uncontroverted that in the month of October, 1957, Reichhold received a written purchase order from National Procurement Company for 106 drums of polyester resin. That this order was filled by Reichhold. One D. Robinson on orders from Eleveld picked up the 106 drums and delivered them to Bond Steel and Warehouse Company. He was paid by Eleveld.

On or about April 28, 1958, some 5 months later, Reichhold received another written order from National Procurement Company for 114 drums of resin. These 114 drums were picked up at Reichhold plant by Kinne Annex Cartage Company on May 2, 1958, and delivered to Detroit Warehouse Company. That the bill for hauling charges was made out to National Procurement & Distributing Corporation and was paid for by National Procurement.

The Government in an attempt to sustain the charge of taking by fraud, introduced much evidence. The evidence shows simply that Reichhold received two written orders for a quantity of resin. One order was sent in the month of October, 1957. The second order was sent in the month of April, 1958.

Previous to receiving the first order in October, 1957, someone who identified himself as a Mr. Wilson and who said he represented National Procurement Company talked to Miss Wheeler of Reichhold. The conversation was not given. Subsequent to phone call a written order was sent to Reichhold (Gov. Ex. Nos. 1, 1-A and 1-B). These exhibits are identical. The credit manager of Reichhold testified that he believed the order sent in by National Procurement was a Federal Government order. That he received calls from persons identifying themselves as a Colonel Stewart and a Colonel Eleveld. He also wrote to National Procurement Corporation at its New York office

and Washington, D.C. office. That he did nothing to check the credit of National Procurement Corporation. He made no effort to ascertain whether or not this was an army order. Five months later (April, 1958) another order was sent in for the same material as in the October, 1957 order by National Procurement Corporation. The form of the order was identical to the October order. This order was filled and the merchandise was also picked up at the Reichhold plant.

The money due on the first order had not been paid when the second order was filled by the Reichhold Chemical Company.

There is nothing in the evidence either written or oral that would tend to show even in the slightest degree that any fraud was practiced on Reichhold Chemical Company.

The Government in a weak attempt to bolster its case introduced evidence much of which was in its nature innuendo.

Testimony was introduced showing that National Procurement Company had only a phone answering and mail service at 550 Fifth Avenue, New York and in Washington, D.C. That the application for the service in New York City bore the name "Charles E. Leggett". That all mail sent to National Procurement Company at the Fifth Avenue address was forwarded to an address in Chicago, Illinois.

Testimony was introduced that the Washington, D.C. answering service received calls from someone who gave his name as Mr. Eleveld, calls from someone who gave his name as Colonel Stewart, calls from someone who gave his name as Charles Leggett. Each of whom inquired if any messages were left for them. That the service also received

calls for National Procurement. That the service received calls from various people asking for a Colonel Eleveld of National Procurement Company and also calls for Leggett.

That at first all mail received by the Washington service was forwarded to the New York City address on Fifth Avenue. Later all mail was sent to Box 110, Oak Park, Illinois, attention of Charles E. Leggett. A letter was also received by the Washington service instructing it to receive messages for Carlton Stewart, Charles E. Leggett and Jack Eleveld and was signed "J. Eleveld".

Testimony was given showing that the credit manager of Reichhold received calls from persons who identified themselves as Colonel Stewart and Colonel Eleveld. Also that Leggett and two others came into a warehouse and checked 4 or 5 drums of the resin stored there.

It was testified by Alice M. Abro, a Government witness office manager for Jefferson Terminal Warehouse that the defendant Eleveld signed the name "Joseph Dunwood" to some warehouse receipts in her presence. The testimony of Alice Abro was rebutted by the testimony of Mr. Richard T. Bowen (handwriting expert). (381a-399a)

Testimony was introduced showing orders received from National Procurement Company by two other companies, one in Nashville, Tennessee and the other in Exeter, New Hampshire. The testimony was the same, neither company made a credit check. Each thought it was a government order.

In the case of *United States* v. *Gardner*, 171 Fed. 2d 753, the court said at page 756:

> "An inference of criminality must rest on something more substantial than the imagination of a prosecuting attorney or a trier of the facts."

It might be said with equal force that an inference of criminality must rest on something more substantial than that the credit manager of Reichhold thought or believed the orders were Government orders. On what substantial basis did he believe that they were Government orders. There is no evidence in the record that either of the defendants even hinted to him that these were Government orders. There is no evidence that the defendants ever talked to him either in person or by phone. The written orders sent in to Reichhold do not in any way indicate that they were orders from the Government.

Another persuasive fact is that after Reichhold filled the first order in October, 1957, another similar order was received in April, 1958, and it too was filled. This despite the fact that it had not been paid for the October, 1957, order.

The evidence shows that Reichhold had received orders for merchandise from the United States Government, previous to receiving orders from the National Procurement Corporation. Certainly it must have been familiar with the type of orders which the Government used and procedure for payment. This testimony was prejudicial to the defendants in consequence neither received a fair and impartial trial.

Even the trial court had doubts as to whether or not the Government had proved its case. The Court said, after the jury had brought in its verdict:

> "I might not agree with the—I think you are guilty all right. I don't think there is any question about that, but whether the Government proved it or not, I don't know. There is a great deal of doubt in my mind, and there still is."

Even though the court made such a statement to the jury after verdict the Court should have set aside the verdict

and found for the defendants not guilty. It is impossible to estimate how much influence the incompetent evidence had upon the jury. It is our contention that the court below should have dismissed the cause for lack of competent evidence to sustain the charges of the indictment upon motion of the defendants.

CONCLUSION.

It is respectfully suggested that the contention of the defendants is a substantial contention, in view of the fact that the defendants were convicted of a crime of which they did not commit. In addition, there is, as we see it, a conflict of decisions between two Circuits which should be resolved.

All of which is respectfully submitted.

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APPENDIX

No. 14255

UNITED STATES COURT OF APPEALS

For The Sixth Circuit

UNITED STATES OF AMERICA, *Plaintiff-Appellee,* v. CHARLES E. LEGGETT and JOHN HENRY ELEVELD, *Defendants-Appellants.*	APPEAL from the United States District Court for the Eastern District of Michigan, Southern Division.

Decided July 25, 1961.

Before MILLER, Chief Judge, McALLISTER and O'SULLIVAN, Circuit Judges.

MILLER, Chief Judge. Appellants, Charles E. Leggett and John Henry Eleveld, were found guilty by a jury under two counts of an indictment charging them with transporting and causing to be transported in interstate commerce from Detroit, Michigan, to Fort Dodge, Iowa, a number of drums of polyester resin of a value in excess of $5,000.00, knowing the same to have been stolen, converted or taken by fraud; in violation of Sections 2314 and 2, Title 18, U. S. Code. The first count charged the transportation of 106 drums of resin on or about November 7, 1957. The second count charged the transportation of 114 drums of resin on or about May 12, 1958.

Leggett's motion for a new trial and arrest of judgment, and Eleveld's motion for a new trial and judgment of acquittal were overruled. Leggett received a sentence of one year and six months and was required to pay court costs in the amount of $1,760.00. Eleveld received a sentence of one year and was required to pay court costs in the amount of $440.00.

Appellants contend on this appeal that the evidence failed to show (1) that the appellants transported or caused to be transported in interstate commerce the resin in question, and (2) that the resin had been stolen, converted or taken by fraud, and that their motions for judgment of acquittal at the close of all the evidence in the case should have been sustained.

The evidence which is in considerable detail can be briefly summarized as follows. It showed that the National Procurement Company, of which the appellants were the dominant figures, obtained 106 drums of polyester resin in October 1957 from Reichhold Chemicals Company at its plant in Ferndale, Michigan. This was picked up by Dale Robinson, a truck driver for Dale's Cartage Company, and delivered to a warehouse called Bond Steel and Storage in Dearborn, Michigan. Eleveld paid Robinson Sixty Dollars in cash for his services. The warehouse was then advised that the drums were transferred to Joseph Dunwood and/or Acme Limited, Zurich, Switzerland. The warehouse received a letter on the letterhead of Acme Limited, signed "Joseph Dunwood," enclosing the warehouse receipts with instructions to release the drums to Sansone Bros. Cartage Company. The trucking company hauled the drums to Jefferson Terminal Warehouse in Detroit, Michigan. Leggett paid the driver $133.00 in cash for the services. From there they were later taken by McCoy Trucking Co. to Glass Craft Boats, Inc., at Fort Dodge, Iowa, at the direc-

tion of E. A. Juzwik, a principal stockholder, vice-president and director of Glass Craft Boats, Inc., who delivered the warehouse receipts to the trucking company for that purpose.

On April 24, 1958, Reichhold Chemicals Company received another order for 114 drums of resin from National Procurement Company. These were picked up at the Reichhold plant and taken to Detroit Warehouse Company at Detroit by Kinme Annex Cartage Company. The truck driver was paid $104.09 in cash for the services. On written instructions from National Procurement Company they were released to Brada Cartage, which company delivered them to Detroit Harbor Terminals, Detroit, Michigan, where they were stored to the account of Joseph Dunwood. Brada was paid $128.93 in cash by appellant Eleveld. A letter was received from Acme Limited, signed by Joseph Dunwood, to release the drums to Juzwik. Norwalk Trucking Company picked up the drums. All but $165.00 of the storage bill was paid to Detroit Harbor Terminals by appellant Eleveld. Juzwik paid $165.00.

Juzwik testified that he issued his personal checks to the order of Joseph Dunwood for $7,000.00, $14,453.70 and $2,584.00 in payment for the warehouse receipts. The checks were made payable to Joseph Dunwood at the request of Leggett and were delivered to Leggett. The checks carried the endorsement of Joseph Dunwood. In addition, Juzwik paid an additional sum of $3,389.00 in cash to Leggett, because Leggett said he needed additional funds.

Reichhold Chemicals did not receive payment for either the October 1957 order or the April 1958 order.

Appellants' contention is that the foregoing evidence shows that the interstate shipments from Detroit, Michigan, to Fort Dodge, Iowa, were not shipments by them, but

were shipments by Joseph Dunwood to Glass Craft Boats, Inc., after the National Procurement Company sold and delivered the resin to Dunwood in Detroit, Michigan. If the sale and delivery of the resin to Dunwood was an actual bona fide sale, this contention would have merit. However, if the purported sale to Dunwood was not a sale but a fictitious transaction, or merely a transfer of possession by appellants to their agent, who later sold to a purchaser in Iowa, the appellants caused the interstate shipment as charged in the indictment. *Section 2, Title 18, U. S. Code. Pereira* v. *United States*, 347 U. S. 1, 8-9; *Metcalf* v. *United States*, 195 F. (2) 213, 217, C. A. 6th; *United States* v. *Tannuzzo*, 174 F. (2) 177, 180, C. A. 2nd; *Baty* v. *United States*, 275 F. (2) 310, C. A. 9th; *United States* v. *Taylor*, 217 F. (2) 397, 398, C. A. 2nd. See also: *Anstess* v. *United States*, 22 F. (2) 594, C. A. 7th; *Backun* v. *United States*, 112 F. (2) 635, C. A. 4th.

In addition to the facts above stated, the office manager of the Jefferson Terminal Warehouse testified that Leggett and Eleveld came into her office in connection with the storage of the resin; that Eleveld was introduced to her as Joseph Dunwood; that he used a calling card in the name of Joseph Dunwood, and signed papers in that name. The secretary to the President of the Detroit Harbor Terminals testified that a man who introduced himself to her as Joseph Dunwood made the arrangements to store the 114 drums at that warehouse. She identified Eleveld as the man. Juzwik testified that he knew Leggett for seven or eight years; that Leggett told him he knew a man by the name of Dunwood who represented a company in Switzerland which was buying merchandise in America and from time to time would have surpluses that it would like to dispose of, which contact led to the purchase of the resin; and that Leggett delivered to him the warehouse receipts of the

Jefferson Terminal Warehouse with the signature of Joseph Dunwood on them.

Joseph Dunwood did not testify. Nor did the evidence show what consideration, if any, passed from the alleged purchaser, Joseph Dunwood, to the National Procurement Company in exchange for the warehouse receipts, if such a sale actually occurred.

The Supreme Court said in *Graves* v. *United States*, 150 U. S. 118, 121, "The rule even in criminal cases is that if a party has it peculiarly within his power to produce witnesses whose testimony would elucidate the transaction, the fact that he does not do it creates the presumption that the testimony, if produced, would be unfavorable." See also: *United States* v. *Conforti*, 200 F. (2) 365, 369, C. A. 7th, cert. denied, 345 U. S. 925; *Campbell* v. *United States*, 269 F. (2) 688, 692, C. A. 1st, reversed on other grounds, 365 U. S. 85; *Troutman* v. *Mutual Life Ins. Co. of New York*, 125 F. (2) 769, 773, C. A. 6th.

In considering a motion for acquittal, the District Judge must take that view of the evidence most favorable to the Government, with inferences reasonably and justifiably to be drawn therefrom, and determine whether a reasonable mind might fairly conclude guilt beyond a reasonable doubt. In making such determination the trial judge does not pass upon the credibility of the witnesses or the weight of the evidence. *Crockett* v. *United States*, 234 F. (2) 560, C. A. 5th; *Bogy* v. *United States*, 96 F. (2) 734, 740, C. A. 6th, cert. denied, 305 U. S. 608. If he concludes that upon such evidence there *must* be such a doubt, he must grant the motion. But if he concludes that it is a question about which reasonable minds might differ, the motion should be overruled and the issue left to the jury. *Curley* v. *United States*, 160 F. (2) 229, 232-233, C. A. D. C., cert. denied,

331 U. S. 837; *Cooper* v. *United States*, 218 F. (2) 39, 41, C. A. D. C.; *Lambert* v. *United States*, 261 F. (2) 799, 801, C. A. 5th; *Linden* v. *United States*, 254 F. (2) 560, 567, C. A. 4th.

We are of the opinion that the evidence in the present case was sufficient to take to the jury the issue of whether the appellants caused to be transported in interstate commerce the resin which was ultimately sold and delivered to Glass Craft Boats, Inc., in Fort Dodge, Iowa.

Nor do we think that there is any merit in appellants' further contention that the evidence was insufficient to take to the jury the question of whether the resin was obtained by fraud. In addition to the evidence previously referred to, it was also shown that the purchase orders for the two purchases of resin totaled $34,352.00, no part of which was ever paid, which resin was shortly thereafter delivered to Glass Craft Boats, Inc., for $27,426.70; that the New York address of National Procurement Company at 550 Fifth Avenue, New York City, was a telephone and mail answering service at that address, and that all mail received for National Procurement Company was forwarded to an address in Chicago, Illinois; and that the National Procurement Company used a telephone secretarial service at 438 Woodward Building in Washington, D. C., from which phone messages and mail were at first sent to New York and later sent to Box 110, Oak Park, Illinois, Attention of Charles E. Leggett.

The question of fraud involves the element of intent. Since it is impossible to look into a defendant's mind for the purpose of ascertaining his intent, it is necessary to consider the circumstances surrounding the transaction and determine intent from what he does or fails to do. By reason of its nature, it is usually very difficult to prove

fraud by direct evidence, and such proof is not necessary. *Pergrem* v. *Smith* (Ky.), 255 S. W. (2) 42, 44; *Battles* v. *United States*, 172 F. (2) 1, 5, C. A. 6th. The issue of fraud is commonly determined by certain recognized indicia, denominated "badges of fraud," which are circumstances so frequently attending fraudulent transfers that an inference of fraud arises from them. *Pergrem* v. *Smith* (Ky.), supra, 255 S. W. (2) 42, 44; *Leonardo* v. *Leonardo*, 251 F. (2) 22, 27, C. A. D. C.; *Bentley* v. *Caille*, 289 Mich. 74, 78. Inadequacy of consideration, secret or hurried transactions not in the usual mode of doing business, and the use of dummies or fictitious parties are common examples of "badges of fraud." As said in the *Bentley* case, supra; "No effort to hinder or delay creditors is more severely condemned by the law than an attempt by a debtor to place his property where he can still enjoy it and at the same time require his creditors to remain unsatisfied." Although "badges of fraud" are not conclusive and are more or less strong or weak according to their nature and the number occurring in the same case, "a concurrence of several badges will always make out a strong case." *Timmer* v. *Pietrzyk*, 272 Mich. 238, 242; *Aiken* v. *United States*, 108 F. (2) 182, 183, C. A. 4th; *Battles* v. *United States*, supra, 172 F. (2) 1, 5, C. A. 6th; *Winchet* v. *United States*, 8 F. (2) 561, 562, C. A. 6th. It is well settled that circumstantial evidence, if strong enough to convince a jury of a defendant's guilt beyond a reasonable doubt, is sufficient to take a case to the jury and sustain a verdict. *Holland* v. *United States*, 348 U. S. 121, 139-140; *United States* v. *Comer*, 288 F. (2) 174, 175, C. A. 6th; *United States* v. *Baxter*, 289 F. (2) 487, C. A. 6th.

In the present case, the immediate disposition of the resin at a price approximately twenty per cent below its purchase price, the failure to pay any portion of the pur-

chase price, the misrepresentation of a bona fide office in New York and Washington, the transfer of the resin from one place to another, always by a different cartage company, the payment of substantial expenses involved therein by cash, and of particular importance, the use of a non-existent or fictitious purchaser in an effort to isolate themselves from the ultimate disposition of the property, were more than enough to take to the jury the issue of the procurement of the resin by fraud.

The judgment is affirmed.

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No. 391

In the Supreme Court of the United States

OCTOBER TERM, 1961

CHARLES E. LEGGETT AND JOHN HENRY ELEVELD,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINION BELOW

The opinion of the court of appeals (R. 418–423; Pet. App. 33–40) is reported at 292 F. 2d 423.

JURISDICTION

The judgment of the court of appeals was entered on July 25, 1961 (R. 417, 418; Pet. App. 33). A petition for rehearing was denied on August 15, 1961 (R. 431). The petition for a writ of certiorari was filed on September 8, 1961. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the evidence was sufficient to support petitioners' conviction for the interstate transporta-

tion of goods of a value in excess of $5,000 acquired through fraud.

2. Whether evidence was improperly admitted on the issue of intent.

STATUTE INVOLVED

18 U.S.C. 2314 provides in pertinent part:

> Whoever transports in interstate * * * commerce any goods, wares, merchandise, securities or money, of the value of $5,000 or more, knowing the same to have been stolen, conve ted or taken by fraud; * * *
>
> * * * * *
>
> Shall be fined not more than $10,000 or imprisoned not more than ten years, or both.
>
> * * * * *

STATEMENT

A two-count indictment returned in the District Court for the Eastern District of Michigan charged petitioners with having on two occasions transported or having caused the transportation in interstate commerce from Detroit, Michigan, to Fort Dodge, Iowa, a number of drums of polyester resin of a value in excess of $5,000, with knowledge that the drums were obtained through theft or fraud, in violation of 18 U.S.C. 2314, *supra* (R. 2). Following a trial by jury, petitioners were convicted as charged. Petitioner Leggett was sentenced to a general term of imprisonment for a year and a half, to be served consecutively to a prison sentence which Leggett was then serving, and ordered to pay court costs in the amount of $1,760 (R. 404). Petitioner Eleveld was sentenced to a general term of imprisonment for a year and ordered to

pay court costs of $440 (R. 405). On appeal, the conviction was unanimously affirmed (R. 417, 418–423; Pet. App. 33–40).

The evidence may be summarized as follows:

1. In 1957, one Edmund Juzwik was vice-president and a director of Glass Craft Boats, Inc., of Fort Dodge, Iowa. He had prior business dealings with petitioner Leggett through a firm called National Procurement (R. 250, 262–263). In September of that year, Leggett asked Juzwik whether he could use some surplus merchandise in his "manufacturing operations" (R. 252–253). Leggett said that he knew a man by the name of "Dunwood," who was a representative of a company in Switzerland which, as a result of its purchasing operations, occasionally had surplus material to dispose of (R. 252–253, 263–265). Juzwik said that he would purchase supplies if they were the "right kind of material" at the "right price" (R. 253).

In October 1957, a "Mr. Wilson" of National Procurement telephoned the Reichhold Chemicals Company of Ferndale, Michigan, and requested Reichhold to submit price quotations on polyester resin to one "Colonel Stewart" of National Procurement in New York (R. 10–11). Reichhold did as requested. On October 15, 1957, National Procurement ordered 106 drums of polyester resin at a total cost of $16,112 (R. 11–13, 83). On October 23, pursuant to arrangements made by petitioner Eleveld, the resin was picked up at Reichhold and stored in a warehouse in Dearborn, Michigan (R. 16–18, 127–129, 131–133, 152, 166, 177–179). Eleveld paid the truck driver in cash

for his services, and the unloading and storage charges were paid for in cash by someone for National Procurement (R. 141, 153–154). After the resin was stored, Leggett and two other men tested some of it (R. 167–173).

In a letter of October 24 signed by "J. Eleveld," National Procurement advised the warehouse that title to the resin had been transferred to "Joseph Dunwood and/or Acme Limited, Zurich, Switzerland" (R. 146–147, 150). Shortly thereafter, the warehouse was instructed by letter from "Joseph Dunwood, Acme Limited Representative" to release the resin to the Sansone Brothers Cartage Company of Detroit (R. 148, 155). In late October, the Sansone Brothers trucking firm, pursuant to arrangements made by Leggett, picked up the resin at the warehouse and delivered it to a warehouse in Detroit where it was unloaded and stored (R. 154–155, 160, 183–185, 192–194, 196, 210, 228–229). Leggett and two other men paid the truck drivers in cash for their services (R. 184–185, 197).

Leggett subsequently sold the warehouse receipts for the resin to Juzwik for about $13,000 (R. 251–254, 258–261, 265–267). Juzwik then sent the warehouse receipts to a trucking firm, and informed the Detroit warehouse that he had purchased the warehouse receipts for the resin (R. 210–211, 213, 248, 269).

Shortly thereafter, petitioners entered the warehouse in Detroit, where Eleveld introduced himself as "Joseph Dunwood" (R. 231–233, 239–240; see R. 215, 217, 220). Eleveld paid the handling and storage charges in cash, and signed papers in the name

"Joseph Dunwood" (R. 221, 231–233, 246–247). Petitioners arranged to have the drums tallied in lots of ten. The "way bills" indicated the consignor as "Acme Limited—A. E. Juswik," and the consignee as Glass Craft Boats of Fort Dodge, Iowa (R. 199–200, 204–205, 208, 227–228). A short time later, the 106 drums of resin were picked up at the warehouse by a trucking firm, and were subsequently shipped to Juzwik at Fort Dodge, Iowa, by another trucking firm (R. 204–205, 208, 210, 226–227, 242–243, 254, 273).

2. In April 1958, a "Colonel Stewart" of National Procurement telephoned the credit manager of Reichhold Chemicals and said that the original invoice for the 106 drums of resin which had been bought in October 1957 had been "lost," and that Reichhold should send duplicate invoices which he would insure would be processed for "immediate payment" (R. 73–74). In late April, without having made payment on the resin obtained in October 1957, National Procurement ordered 114 additional drums of polyester resin from Reichhold at a total price of $18,240 (R. 19–24, 83). Reichhold's credit manager left instructions with the plant that the second order was not to be shipped until payment was received on the first order. Shortly thereafter, a man who identified himself as "Col. Eleveld" telephoned the credit manager and said that National Procurement had paid $32,000 "by mistake," and that Reichhold should apply the "overpayment" to the second order (R. 84–85, 116–117). As a result of this telephone call, the credit department permitted the April order to be shipped (R. 117). On May 2, 1958, a trucking firm picked up

114 drums of resin at the Reichhold plant in Ferndale, Michigan, and brought it to a warehouse in Detroit where it was unloaded and stored for National Procurement (R. 25–27, 90, 104, 278–283, 284–286, 293–294). Leggett paid the storage charges (R. 289–290, 292–293).

In a letter signed by "C. O. Stewart," National Procurement subsequently advised the warehouse that the resin should be released to "Joseph Dunwood and/or Acme Limited, Zurich, Switzerland" (R. 288–289; see R. 294). A few days later, the 114 drums of resin were picked up by another trucking firm and transported to another Detroit warehouse where it was unloaded and stored. Eleveld paid the trucking firm in cash for its services and, in making storage arrangements, introduced himself to a warehouse-representative as "Joseph Dunwood" (R. 296–298, 301–302, 320–321). In the meantime, Leggett sold the warehouse receipts to Juzwik for $14,453.70, and a check in that amount was made payable to "Joseph Dunwood" and given to Leggett (R. 258–259). The warehouse was subsequently informed by letter from "Joseph Dunwood" that the warehouse receipts were being turned over to Mr. Juzwik, and that the warehouse was authorized to release the resin to Juzwik (R. 305–308, 315). Eleveld and Juzwik paid the storage charges (R. 310). A short time later, a trucking firm picked up the resin, which was subsequently delivered to Glass Craft Boats in Fort Dodge, Iowa, by another trucking company (R. 206–208, 273, 304, 309, 312–313).

Reichhold Chemicals never received any payments on the two shipments of resin, despite efforts by

it and a collection agency to collect payment, and National Procurement's account, totaling $34,352 due and owing, was written off as "bad debts" (R. 71–73, 82–85, 91–95, 98, 112–113; see R. 29).

3. National Procurement used the telephone number and mailing address of a New York City telephone answering service in 1957 and 1958, and mail sent to National Procurement at that address was forwarded to "Charles E. Leggett" at a Chicago address (R. 39–44, 408–409). During the same period, National Procurement had a telephone answering and mail service account with a Washington, D.C., answering firm (R. 45–46, 48–49, 410–412). Reichhold's credit manager telephoned the Washington number and left messages for "Colonel Stewart" to call him. The credit manager subsequently received telephone calls from "Colonel Stewart" and "Colonel Eleveld" (R. 73–74).

National Procurement's purchase orders sent to Reichhold included authorization numbers, requisition numbers, warrant numbers, account numbers, terms, shipping points and routing (R. 12, 23, 37). The first purchase order stated that inspection was waived, that the entire shipment was to be made available "for truck pick-up starting at 0900 hours 23 October 1957," that the loading would be supervised by its personnel, and was signed by a Colonel over the designation "Procurement Director" (R. 10–14). Reichhold's credit manager testified that Reichhold had supplied products including polyester resin to the government in the past and that he treated the purchase orders of National Procure-

ment as government orders when he was informed by the shipping manager, who possessed the orders, that they were "identical" to government orders (R. 74–75, 81–82, 106–108, 118, 408, 413). He said that an added reason for his believing that the purchase orders were government orders was because the people from National Procurement with whom he dealt identified themselves as colonels (R. 118–119). He testified that Reichhold did not investigate the credit standing of National Procurement because he believed that Reichhold was dealing with the United States Army (R. 118–119). The shipping manager of Reichhold testified that National Procurement's purchase orders were similar to government orders and that the shipping department treated them as government orders (R. 408).

Beginning in late 1957, Glass Craft Boats, Inc. purchased fiber glass cloth from Leggett (R. 251, 254, 274–275). Juzwik testified that he believed that a shipment of fiber glass came from a warehouse in Tennessee (R. 254). The sales supervisor of the fiber glass division of a firm in Nashville, Tennessee, testified that he had been asked for price quotations by a person who identified himself as Lieutenant Colonel Eleveld; representing National Procurement. The person calling said he was with an emergency purchasing group and that the materials were needed in the missile program. The sales supervisor was subsequently contacted by another person who identified himself as "Colonel Stewart." The supervisor believed that the company was doing business with the government (R. 347–352). The credit standing of

National Procurement was not investigated for this reason. Two shipments of fiber glass were picked up (R. 349–350).

The sales manager for the fiber glass division of a New Hampshire Company testified that in 1958 he received telephone calls from a person who identified himself as Lieutenant Colonel Eleveld of National Procurement and that materials were later ordered by National Procurement. The company believed that it was doing business with the government (R. 323–324, 326, 328–330, 332, 334–336, 340, 342). The materials furnished to National Procurement were replevied from a New Hampshire warehouse after the company discovered that it was not dealing with the government (R. 335–336, 343–344).

ARGUMENT

1. Petitioners contend (Pet. 19–30) that the evidence was insufficient to prove three basic elements of the offense with which they were charged. This contention, however, was properly rejected by the court below and presents no issue warranting further review by this Court.

a. Petitioners seek to insulate themselves from the interstate shipments by pointing out that "Dunwood" purchased the resin from National Procurement, had it stored, and subsequently sold it to Juzwik who arranged for its interstate shipment. Their argument overlooks the clear evidence that Leggett himself sold the warehouse receipts to Juzwik; that Leggett received over $23,000 in checks on behalf of "Dunwood"

and over $3,000 in cash from Juzwik in payment for the resin; that Leggett inquired in Iowa of Juzwik's supply needs in his "manufacturing operations" prior to the placing by National Procurement of its first order for resin with Reichhold; that petitioners arranged for the storage of the resin after its "sale" to "Dunwood"; that petitioners paid the truck drivers for hauling the resin and paid some of the storage charges after the resin was "sold" to Dunwood; that Eleveld, in the company of Leggett, represented himself as "Joseph Dunwood" to warehouse personnel immediately prior to the first interstate shipment; and that, prior to that interstate shipment, petitioners requested that the warehouse have the drums tallied in groups of ten for shipment. Whether or not a "Joseph Dunwood" existed and whether or not National Procurement sold the resin to him, the fact remains that petitioners knew that the resin was destined for an interstate shipment and actively caused and facilitated this shipment. In short, petitioners were actively interested in the resin from the time it was obtained from Reichhold to the time of its shipment from Detroit to Fort Dodge, Iowa. In answer to special questions, the jury found that petitioners knew that the resin was destined for an interstate shipment (R. 414).[1]

[1] Petitioners' claim (Pet. 17, 20, 25) that the decision below conflicts with *United States* v. *Gordon*, 253 F. 2d 177 (C.A. 7), is misplaced. In that case, where the defendant helped load the stolen property into an automobile, there was no direct evidence that the defendant knew that the property had been stolen or that it was being transported in interstate commerce. *Id.* at 181. Moreover, there was nothing in the record to indicate that the

b. The argument that the proof did not show the value of the resin is rebutted by the record. Reichhold sold each shipment to National Procurement for over $16,000, and Leggett sold the warehouse receipts for the first shipment for about $13,000 and the warehouse receipts for the second shipment for about $14,000 (R. 83, 251–254, 258–261, 265–267).

c. The record shows beyond any doubt that petitioners, through National Procurement, obtained the resin from Reichhold through fraud. Business men do not ordinarily sell materials for which there is a market at substantially less than the purchase price if they intend to pay the purchase price. See *Blumenthal* v. *United States,* 332 U.S. 539, 550, where this Court noted that it was reasonable inference that in a time of shortages an owner of liquor was not selling at cost or slightly above. Not only were no payments ever received by Reichhold on National Procurement's outstanding indebtedness, but National Procurement induced Reichhold, through a telephone call from a "Col. Eleveld," to ship the second order of resin by representing that a $32,000 check was mailed to Reichhold, and that the "overpayment" should be applied to the second order. There was also evidence that National Procurement sought to rep-

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defendant had any further interest in the property or the proceeds from it after it was loaded. *Id.* at 181–182. Here, in contrast, the evidence showed that petitioners themselves perpetrated the fraud and therefore had knowledge of it; they were actively engaged in transporting the resin in interstate commerce; and they had a financial interest in its shipment. In any event, both the *Gordon* and instant cases concern the evaluation of different evidence in two different records. Thus, there is no possible conflict on any general question of law.

resent itself to Reichhold and others as a purchasing group for the federal government, *i.e.*, the character of its purchase orders and the many uses of the military rank of "Colonel" in dealing with Reichhold.

2. The evidence that National Procurement sought to represent itself as a government purchasing agency was clearly admissible. As we have seen, it tended to show that National Procurement and thus petitioners obtained the resin from Reichhold with the intent to defraud. It was not necessary for the government to introduce legitimate government purchase orders into evidence for comparison purposes. There was testimony from a person who had dealt with the government that National Procurement's purchase orders were identical with government purchase orders. The fact that Reichhold, and other parties who had dealt with National Procurement, believed National Procurement's purchase orders to be government orders was in itself some evidence of their fraudulent character. As was pointed out in a recent mail fraud case, "[t]he tendency of the form to mislead is shown by testimony that it did mislead." *Linden* v. *United States*, 254 F. 2d 560, 566 (C.A. 4).

CONCLUSION

For the foregoing reasons, we respectfully submit that the petition for a writ of certiorari should be denied.

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IN THE

Supreme Court of the United States

OCTOBER TERM, A.D. 1961

No. 391

CHARLES E. LEGGETT and JOHN HENRY ELEVELD,
Petitioners,

vs.

UNITED STATES OF AMERICA,
Respondent.

On Petition For Writ Of Certiorari To the United States Court of Appeals For the Sixth Circuit

Petition for Rehearing

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Petition for Rehearing

May it please the Court:

Our petition for certiorari was filed and certiorari was denied November 13, 1961.

In our petition for certiorari we sought to apprise the court of the fact that the defendants were convicted on an indictment of two counts charging a violation of Section

2314 and 2, Title 18 of U.S.C. The theory of the government that this crime violates the interstate law is stretching the jurisdiction of the Federal government over local crimes. These goods were bought and sold in Detroit; came to rest in Detroit and could not be construed as being in transit or in interstate commerce. The goods were sold to the National Procurement Company in Detroit. Sold by National Procurement to Acme Limited, in Detroit, and shifted to a different warehouse in Detroit from whence it was shipped to Iowa by the last purchaser. To say that the defendants knowingly took by fraud with the intention of shipping the goods to a buyer across state lines ignores the evidence. The goods laid in the first warehouse for about a month with no buyer in sight.

It is our contention that the Federal authorities have no jurisdiction in this case. Where does the Federal jurisdiction end?

Where does State jurisdiction begin? These questions are paramount in that the illogical reasoning of the Circuit Court of Appeals should be clarified in view of the rule in the *Gordon* case.

We earnestly contend that the record does not support the conviction because no Federal Law was violated and we respectfully urge that Certiorari should be granted.

Respectfully submitted,

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NO. 391

CHARLES E. LEGGETT AND JOHN HENRY ELEVELD,
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Respondent.

JOSEPH I. BULGER does hereby certify that he is one of the Attorneys for the Petitioners and does further certify that the Petition for rehearing filed in this cause is presented in good faith and not for delay and is restricted to the grounds specified in Rule 58 (2) of the Rules of the Supreme Court, to-wit: to intervening circumstances of substantial or controlling effect and to a substantial ground available to Petitioners though not previously presented.

The Petitioners are at liberty under Bond approved by the Circuit Court of Appeals for the 6th Circuit.

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JOSEPH I. BULGER